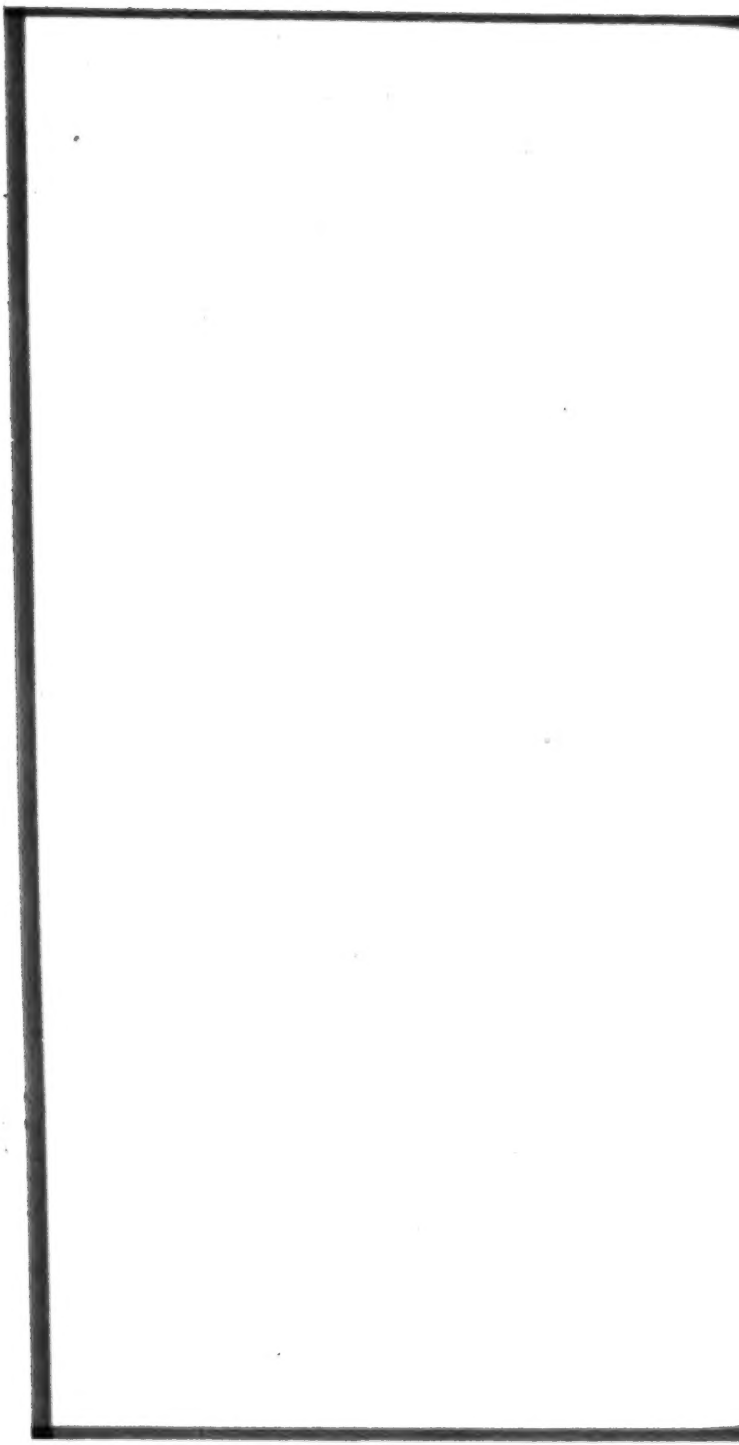

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Supreme Court Of The United States

October Terms, 1973
No. 73-473

DANIEL T. TAYLOR, III - - - Petitioner

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION - - - - - - - - - Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION — *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky, *Taylor* v. *Hayes*, is officially reported in Ky., 494 S.W.2d 737 and is printed in the Appendix, pages 5-19.

JURISDICTION

The respondent says that this court granted petitioner's petition for a writ of certiorari on December 3, 1973, but limited it to the following questions: (App. 4).

1. When a trial judge summarily imposes consecutive sentences on eight counts of contempt

aggregating four and one-half years' imprisonment, including sentences of one year's imprisonment on two counts, whether he or the appellate court may subsequently, in order to defeat the alleged contemnor's right to trial by jury, reduce the sentences so that the sentence on no one count exceeds six months' imprisonment and direct that the sentences run concurrently for a total of six months' imprisonment?

2. When alleged contempts have been committed by an attorney in the presence of the trial judge and the trial judge proceeds summarily to punish for contempt, whether due process requires that the attorney be given some opportunity to be heard in defense or mitigation before he is finally adjudged guilty and sentence is imposed?

3. Whether, in the circumstances of this case, the trial judge could impartially sit in judgment on multiple contempt charges against the petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees that petitioner has claimed rights under the Sixth and Fourteenth Amendments to the United States Constitution, but does not agree that any right of petitioner's has been violated.

QUESTIONS PRESENTED

1. When a state trial judge corrects judgments of contempt with the approval of the state's highest court and the result is that the contemnor's actual sentence does not exceed six months, does this violate contemnor's right to a trial by jury?

2. Where, during the trial, petitioner and contemnor has been held in contempt outside the presence of the jury and throughout the trial given reasonable opportunity to respond, and where, in some cases, petitioner availed himself of the opportunity, and in other cases he did not, was he entitled to a further hearing before punishment was imposed?

3. Where, after petitioner and contemnor was adjudged to be in contempt for the first time, and this contempt finding was later modified to a warning, and where throughout a protracted trial the respondent, the presiding judge in a murder trial, showed consideration to petitioner, a lawyer, and where there were no obscenities, vilifications or vitriolic exchanges, and where the entire record showed that respondent acted with restraint, and none of the facts which existed in *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971), *United States* v. *Seale*, 461 F.2d 345, CA 7, 1972, *In re Dellinger*, 461 F.2d 389, CA 7, 1972, or *Ungar* v. *Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964) existed, was the trial judge required to recuse himself and allot the case to another judge for the imposition of the sentences on the contempt judgments?

STATEMENT OF THE CASE*

The respondent, John P. Hayes, at all times material herein was and is Judge of the Jefferson Circuit Court,

* References to the transcript of the trial of *Commonwealth* v. *Tinsley* that are not included in the Appendix are indicated by the prefix "Tr." References to the Transcript of Record in *Commonwealth* v. *Tinsley* are indicated by the prefix "R."

Criminal Branch, Second Division, a court of general jurisdiction within the Commonwealth of Kentucky. Jefferson County is Kentucky's largest county, and Louisville is its county seat. It has seven Common Pleas Judges, six Chancellors and three Criminal Judges for a total of sixteen Circuit Judges.

These proceedings arose from the trials of Narvel Tinsley and William Michael Tinsley. The petitioner represented Narvel Tinsley, and Messrs. Robert Flemming, Tim McCall and Charles Scott represented William Michael Tinsley. It was alleged that William Michael Tinsley and his brother, Narvel Tinsley, murdered two Louisville policemen. The evidence showed that William Michael Tinsley shot one policeman, and Narvel Tinsley shot the other.

The slaying of the two officers and the ensuing events engendered much publicity via the media, and this was compounded by Narvel Tinsley's escape from the Jefferson County Jail shortly before the trial commenced. Because of this, the trial judge permitted great latitude on voir dire and only limited it when the privilege was obviously being abused. It took three days, four volumes and 720 pages to select fourteen trial jurors (TR Vols. 1, 2, 3 and 4).

During the trial, several motions were made for a severance and for a mistrial. The motions were primarily made by counsel for William Michael Tinsley, although joined in by petitioner, because the defenses between the two Tinsleys were antagonistic and because counsel for William Michael Tinsley contended that the conduct and antics of the petitioner, counsel for Narvel Tinsley, were greatly prejudicing the rights of William Michael Tinsley. These motions were all overruled. The

Kentucky court affirmed the convictions of William Michael and Narvel Tinsley, *Tinsley* v. *Commonwealth*, Ky., 495 S.W.2d 776. Certiorari was denied William Michael Tinsley, #73-5517, *William Michael Tinsley, petitioner* v. *Kentucky*, 38 L.Ed.2d 484.

The complexities of the trial coupled with the seriousness of the charges and the possible verdicts called for the most careful and studied advocacy. It is obvious from a cursory examination of the transcript that the worst possible tactic would be to inflame or antagonize a jury already combustible because of the basic facts of the case. Notwithstanding this, the petitioner proceeded to engage in conduct and demean himself in such a manner that causes utter disbelief when considered in view of the total circumstances. We turn now to the events leading to the respondent's citation of petitioner for eight separate counts of criminal contempt.

We start with Volume II of the Transcript (TR 347) (App. 30) where the court for the first time held Mr. Taylor in contempt for repeatedly asking questions he had been directed not to ask. At this point, the court indicated it was going to take over the voir dire, and the colloquy continued through TR 358 (App. 37). The respondent rescinded his order of contempt and warned Mr. Taylor. Respondent admonished Mr. Taylor that his rules were to be obeyed (TR 357) (App. 367). The court softened his ruling relative to taking complete control of the voir dire (TR 354) (App. 34). A complete discussion was engaged in between court and counsel relative to petitioner's conduct. It is obvious that respondent showed great restraint and great considera-

tion in the proceedings concerning this first incident (App. 39).

The first actual contempt citation was not imposed until Friday, October 22, 1971 (App. 42-54) when the court cited Taylor for contempt because he completely and continuously ignored the court's order not to discuss Narvel Tinsley's escape from the Jefferson County Jail. The court also criticized Taylor's courtroom antics, and a colloquy took place. Taylor had referred to the escape at TR 1078 and after an objection was sustained to it at TR 1078, he referred to that "little old case in the Jefferson County—." Taylor was given an opportunity to respond for the record. (Although Taylor had been told directly by the court how to use a previously written statement, TR 1072, he ignored this at TR 1075, 1076, and proceeded to inferentially and directly disregard the court's order (TR 1071, 1080).)

The next contempt citation occurred October 23, 1971 and may be found at App. 56. After the court admonished Taylor to stop arguing, Taylor replied, "I'll certainly keep that in mind, Your Honor.", in a contemptuous and smart aleck manner. Taylor responded to this citation (App. 56-64). The court comments on Taylor's tone of voice, his motions and his antics at App. 59.

The next contempt occurred during the cross-examination of Narvel Tinsley by Mr. Schroering (App. 69). The court told Taylor to sit down. Taylor interrupted, the court overruled him, Mr. Taylor continued, and the court overruled him again, at which time the proceedings were adjourned to Chambers where again Taylor was cited for contempt of court

(App. 69). Mr. Taylor was permitted to respond (App. 70-79). While in Chambers and at TR 1804, the court again admonished petitioner when he ruled that was it and that when he told Taylor to sit down, he meant sit down. In other words, he told him to stop arguing with every ruling of the court and to obey the orders of the court. We note Mr. Schroering's comments about Mr. Taylor's behavior (App. 78-79).

The next contempt occured in Volume XIII of the Transcript and involved Taylor's direct examination of Ervin Foley, Legal Advisor to the Police Department (App. 97). Taylor was given an opportunity to respond to the contempt citation. An objection had been sustained to Taylor referring to a press conference, and he became obstreperous with the court relative to some seating arrangement and gave a smart aleck reply to the court's ruling (App. 95-96). The next contempt involved witness, Jesse Taylor, and related to the use of a statement. The court had sustained an objection to Taylor's use of the statement (App. 105) and notwithstanding this, Taylor continued to ask the very questions to which the court had sustained an objection (App. 105-106) and respondent again held him in contempt and told Taylor he could respond at the next recess (App. 107).

Contempt number seven again involved Taylor going into the press conference and for waving his arms at a witness in such a fashion that caused counsel for William Michael Tinsley to object (App. 108). When Taylor was actually held in contempt and given an opportunity to respond for the record, he did. After the court returned, he wanted the record to reflect that at no time had Mr. Schroering been held in contempt. The

fact that the court briefly left the room in no manner prevented Taylor from denying that he had disobeyed the court's order or that he had not flapped his arms in a contemptuous manner. As far as the record shows, he may have responded, but if he did not, no bystander's bill was presented or filed.

The next contempt occurred at App. 113. Taylor had completed the direct examination of Lt. Garrett when it was called to the court's attention that one of Mr. Taylor's aides had not been searched. The court told Taylor to proceed and Taylor refused. Although the court directly told Taylor to proceed, Taylor refused. He responded (App. 115-116).

The last contempt occurred at App. 117-119 when Taylor asked witness Miller if he had "talked with this nice police officer—." This inspired an outburst of laughter from the audience (App. 118). Taylor continued his improper examination of this witness in direct disobedience to the court's order (App. 119), and Taylor made no request to be heard in defense or mitigation.

He responded to all contempts in his final argument (App. 119).

The foregoing actions on the part of Taylor were all in direct disobedience to a direct order of the court. All of the actions were designed and calculated to demonstrate utter disrespect to the court and the total administration of justice. Taylor was given a reasonable chance to respond, yet at no time during the entire transcript are any of the facts upon which the contempt charges were based put into serious issue. It will be observed that during these entire proceedings, the court

exercised restraint, was most careful not to cite Taylor for contempt in the presence of the jury and did everything but beg him to behave himself. This Taylor disdainfully refused to do.

We are mindful that this court did not grant certiorari on the question of whether or not Taylor's actions were contemptuous. We have, however, reviewed the testimony which gave rise to the contempt citations for the purpose of showing that Taylor was granted allocution and for the further purpose of demonstrating to this court that the respondent had no personal embroilment with Taylor which would prevent him from fairly imposing sentences at the conclusion of the trial. Otherwise, the respondent would have cited Taylor numerous times as this record demonstrates for things that were said and done in Chambers, e.g. App. 83.

Oftentimes while a jury is out, lawyers make motions to take up other matters with the court. This record is barren of any effort on Taylor's part to further respond to the contempt citations.

Taylor argued the case for Narvel Tinsley (TR 2196-2245), but he spent more time in the defense of his own conduct than he did that of Narvel's.

After the verdict, the polling of the jury, and oral motions for a new trial on behalf of William Michael Tinsley and Narvel Tinsley, respondent imposed punishment on petitioner for the contempts of which he stood convicted (TR 2285-2287). The point should be made here that it is respondent's position that allocution was granted before the punishments were imposed. The allocutions were granted at the time the contempts occurred, or at least the reasonable opportunity was

given to respond, up until the sentencing transpired. We make the point now because it will be emphasized throughout this brief. We would ask the Court to remember that at some point the court must have the last word. It must also be remembered that the contempts for which petitioner was cited occurred in open Court in the presence of the jury, were transcribed by the official court reporter, but the actual citations were not imposed except in Chambers or out of the hearing of the jury.

After punishment was imposed, the judgment imposing the sentences was corrected, the sentences reduced and the requirement that the sentences be served consecutively was eliminated. This was done on notice to petitioner's counsel (App. 27), and oddly enough petitioner's counsel objected. Although petitioner now claims that this was a deliberate action on the part of respondent to deny him a trial by jury, this was not the basis of petitioner's response to Judge Hayes' motion to correct the judgment.[1]

[1] Court of Appeals of Kentucky, Daniel T. Taylor, III, Petitioner-Appellant, v. John P. Hayes, Jefferson Circuit Court, Criminal Branch, Second Division, Respondent-Appellee, Response to Motion to Correct Judgment. Comes now, Daniel T. Taylor, III, petitioner-appellant herein, by counsel, and asks that the Court deny the motion of the respondent-appellee to correct the judgment entered in the above case. In response to this motion petitioner-appellant shows to the Court as follows: 1. The motion is made under RCr 10.10, which refers only to clerical mistakes and errors arising from oversight or omission. The motion states that there should be eight counts of contempt instead of nine, the first count having been changed to a warning. It then states that the motion is made to comply with recent Supreme Court cases. 2. Nowhere does the respondent-appellee indicate when the first count was changed to a warning. He does not state that it was done during the trial, and it was not. Obviously conscious of having committed serious reversible error, he is trying to undo his action retroactively. This cannot be done. 3. The respondent-appellee held the petitioner guilty on nine counts of contempt and sentenced him to four and one-half years in prison, as the record reveals. If he gave a proper warning during the trial, this will appear in the record. The record and the respondent-appellee's actions speak for themselves, and it is on this record

After Taylor's appeal was perfected to the Court of Appeals of Kentucky, exhaustive briefs were filed on petitioner's behalf. The highest court of Kentucky rendered its opinion (App. 5-21), and in essence it held:

(1) That Taylor's actions were deliberate and clearly contemptuous.

(2) That the actual sentence Taylor must serve did not exceed six months.

(3) "That a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the Court's Chambers."

(4) That Judge Hayes was not disqualified to act because of any personal embroilment in the controversy as an "activist seeking combat" or by reason of personal attacks upon the Judge which in themselves carry a potential for bias.

(5) That Taylor was warned upon each occasion of his contemptuous action and of the court's holding that he was in contempt.

(6) That as the corrected judgment did not direct that the sentences as amended be served consecutively, they must be served concurrently and that, therefore, the total sentence actually imposed is a jail sentence of six months, and that because of this, Taylor was not entitled to a trial by jury.

This case has been comprehensively and ably briefed on behalf of petitioner, and it will be noted that the

(Footnote continued from page 10)
that the validity of his actions must be determined. Wherefore, the motion should be denied. Robert Allen Sedler, College of Law, University of Kentucky, Lexington, Kentucky 40506, Attorney for Petitioner-Appellant. Notice of Service—I hereby certify that a copy of the foregoing response was sent to the respondent-appellee at his office address by mail, first-class postage prepaid, this the 16th day of February, 1972. Filed February 17, 1972. Frances Jones Mills, Clerk, Court of Appeals, (Record of Proceedings, Court of Appeals of Kentucky).

respondent has freely consented to the filing of briefs for amicus curiae. Confronted with the plethora of solemn legal pronouncements made by our learned brothers, it is with some trepidation that we now turn to the argument of this case. Being aware that this court will read petitioner's last argument last, we will argue in inverse order.

SUMMARY OF ARGUMENT

I. The worst argument any lawyer can ever make in a brief is to request the court, if there is doubt about it, to read the entire transcript. The transcript in this case consists of fifteen volumes. We stand on the proposition that respondent's actions and treatment of petitioner did *not* demonstrate such personal embroilment or hostility as to require respondent to recuse himself from passing sentence upon petitioner. The record is replete with instances of courteous and fair treatment of Taylor by Judge Hayes, and it is odd that if his intention was to "bait Taylor" the respondent would have rescinded his first order of contempt and engaged in a free and frank discussion of his conduct. The contention that respondend was deliberately out to get Taylor is utter nonsense and unworthy of those who make it. There were no vilifications, no insults, no shouting matches, no epithets or anything else in this record that would demonstrate a personal hostility. Just because a judge might say to a lawyer, "If you don't stop this nonsense, you're going to be found in contempt and maybe sent to jail", does not indicate a personal bias. In fact, any judge worth his salt would do just exactly as Judge Hayes did here, and that is rescind his first order of con-

tempt, warn Taylor thoroughly and further provide that the proceedings were to be kept private so no opprobrium would attach to Taylor that could possibly interfere with the trial of the case.

II. Petitoner's claim that he was deprived of due process of law when the trial judge proceeded summarily to find him guilty of contempt and to impose punishment totally ignores what happened during this trial. First, Taylor was warned about his conduct. Second, each time during the trial that he was cited for contempt, he was so told by the respondent and he was given a reasonable opportunity to respond. In each instance, he was told or knew what he had done. He had ample opportunity to respond and in most instances did ad nauseam. In no instance did he put in issue the happening of the event for which he was cited. Admittedly, he argued about the statement, the blackboard, and the seating arrangements, and the court's ruling thereon, but the reason he was held in contempt was because he disobeyed a direct order of the court while the trial was in process. The contention or suggestion that this court should consider whether summary punishment for contempt itself is violative of due process ignores reality. Regrettably and because of people like petitioner, a court must possess the summary power of contempt. This argument overlooks the rights of others to a fair and orderly trial. This argument overlooks the stark fact that there are people who will deliberately disrupt the trial to gain a legal end. The public has some rights here, and notwithstanding amicus' views to the contrary, other lawyers have some rights here.

III. Petitioner's claim that the original sentence is inviolate and that the subsequent modification thereof is of no effect and that, therefore, petitioner's right to a trial by jury was violated is ill-founded. This court has held that the "actual sentence to be served" is determinative of whether an offense is a serious one or a petty one and determinative of the right to a trial by jury. Although respondent and the Court of Appeals of Kentucky held ultimately the sentences should be served concurrently, thereby putting a maximum six months upon it, we are not at all certain that this is the best rule. Why should a limit of six months be set forth in advance unless the trial court chooses to engage in the exhaustive process of empaneling a jury and retrying the whole issue, which the trial court saw and heard, and then giving the jury vague instructions relative to guilt and punishment? If, during the trial of a case, a contemnor commits thirty contempts, each one warranting thirty days in jail, why should he not serve thirty months in jail? If a man is found guilty of three storehouse breakings and given the maximum of five years on each, the trial judge has the option of determining whether they should be served concurrently or consecutively—five years or fifteen years. Why should the rule be any different for a contemptuous lawyer? If a person is locked up and convicted for drunk driving twice in the same day, that person can certainly receive two sentences and elongate the period for which his license is revoked. Thus, it might be well to inhibit the right of a trial by jury in a contempt case rather than enlarge it.

ARGUMENT

I.

IN THE CIRCUMSTANCES OF THIS CASE, THE TRIAL JUDGE AND RESPONDENT COULD IMPARTIALLY SIT IN JUDGMENT ON MULTIPLE CONTEMPT CHARGES AGAINST THE PETITIONER.

We are absolutely amazed that petitioner and amicus with a straight face can argue that respondent's attitude and treatment of petitioner during the protracted trial involved here demonstrated "animus and hostility . . . " or that he was an "activist seeking combat" or "obvious lack of impartiality." In an obvious attempt to mislead this court, petitioner has lifted discrete items from the transcript in an attempt to make his point. A review of the colloquy (App. 30-37) completely disposes of the scurrilous remarks made by petitioner relative to respondent's bias. It is inconsistent with hostility, bias and all other ugly terms employed that respondent would rescind the contempt order after a complete and frank discussion with petitioner. All during the trial respondent would remind petitioner that when he made an order, even if he was wrong, petitioner must obey it. Any other situation would result in chaos.

With the use of unfair and incomplete quotes from the transcript, petitioner attempts to equate the situation here to cases like *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed. 2d 532 (1971), where Mayberry hurled vile epithets at the trial judge, *Offutt* v. *United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954), which was characterized as a shouting match,

and *Johnson* v. *Mississippi*, 403 U.S. 212, 29 L.Ed. 2d 432, 91 S.Ct. 1778 (1971), where the trial judge was a defendant in a lawsuit brought by the contemnor. Nor is the case like *In re Dellinger*, 461 F.2d 389, CA 7, 1972, wherein counsel and the trial judge had a continuous verbal exchange for four and a half months in front of the jury.

This case more nearly fits *Ungar* v. *Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964). Among other things, Ungar said to Judge Sarafite, "I am not going to answer your questions Your Honor. I am not going to testify in this confusion and the court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of Your Honor's attitude and conduct toward me. I am being coerced and intimidated and badgered. The court is suppressing the evidence." Whereupon, Judge Sarafite replied, "You are not only contemptuous but disorderly and insolent." It will be remembered that Ungar, although a witness, was also a lawyer. A majority of this court affirmed Ungar's conviction for contempt by Judge Sarafite. The contempt judgment was imposed two days after the trial. Mr. Justice Harlan concurred and stated that the contempt procedure employed by Judge Sarafite accorded Ungar more than is due and that Judge Sarafite could have proceeded immediately after the trial. It will be remembered that Judge Sarafite had not told Ungar that he was in contempt during the trial and would be punished later as was done in the case at bar by respondent. Mr. Justice Goldberg's dissent is interesting in that he stated that he was convinced that the contempt charge was not such an open threat to the orderly

procedure of the court as to necessitate instant punishment. If the words "you are not only contemptuous but disorderly and insolent" made during the trial by the judge are not sufficient to disqualify, then nothing that Judge Hayes said to Taylor during the trial of this case comes anywhere close. If Judge Hayes had said nothing to Taylor during the trial, Taylor would now argue that he was never warned. Judge Hayes' remarks at the time he sentenced petitioner are totally irrelevant to the claim of bias or hostility.

Let us now review *Sacher* v. *United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451. To quote from the dissent, "After a nine months trial of leaders of the Communist Party, a jury brought in a verdict of guilty and was discharged. Immediately, presiding Judge Medina asked all the defendants' lawyers to stand up, then read them a very minor part of a lengthy 'contempt certificate' in which they were alleged to have committed many acts of contempt at various times during the protracted trial. Without affording any of them the chance to say a word before he acted, the presiding judge held all of them guilty of contempt and sentenced each one to prison."

During the trial, the court called one lawyer a liar and another a communist. The court told Sacher that he was becoming positively insolent. The court felt that he was being accused of being in connivance with the United States Attorney, and he understood that he was being charged with being biased, prejudiced, corrupt and everything else.

The claim was made in this court that the contempts should have been dealt with by another judge. Although in *Sacher* counsel repeatedly were warned that their

conduct was regarded as contemptuous, no actual contempt citations were made until after the trial. Therefore, no opportunity to respond or response was present in *Sacher* as was present here. The Appendix reveals that there was constant rangling between counsel and Judge Medina.

We think certain language contained in *Sacher* is so relevant here that we set it forth in its entirety:

> Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
>
> In this case counsel repeatedly were warned that their conduct was regarded as contemptuous. No

claim can be made that the judge awaited the close of the trial to pounce upon them for some offense

*[11]

unnoted at the time *it occurred. If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

We are urged that these sentences will have an intimidating effect on the legal profession, whose members hereafter will decline to appear in trials where "defendants are objects of hostility to those in power," or will do so under a "cloud of fear" which "threatens the right of the American people to be represented fearlessly and vigorously by counsel."

That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client.

The profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates

*[13]

*that before punishment takes effect he may have

appeal on law and fact to the Court of Appeals. Petitioners, as yet, have served no part of their sentences but have been enlarged on bail while their conduct has been directly reviewed by one Court of Appeals on their own appeal and considered indirectly by a differently composed Court of Appeals on their clients' appeal. Some of those judges had trial and appellate experience almost unparalleled in length and variety. These lawyers have not been condemned, as they claim, merely by the impulse of one lone and hostile judge. Their conduct has been condemned by every judge who has examined this record under a duty to review the facts. It is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after such extended and detached consideration. Moreover, if power of contempt excites fear and terror in the bar, it would hardly be relieved by upholding petitioners' contention that the judge may proceed against a lawyer at the precise moment of maximum heat but may not do so if he awaits a cooler second thought.

We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt.

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining

> to the office of the advocate on behalf of any person whatsoever. But it will
>
> *[14]
>
> *not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

Comparing the record here with the record in *Sacher* is like comparing Heaven and Hell.

On analysis of all the possibilities, we are convinced that Judge Hayes acted in the best possible way. Let us illustrate. If Judges Hayes had done nothing during the trial and made no citations for contempt but after the trial had charged Taylor with various contempts, two things would have occurred. One, the trial would have become completely out of control and no one would have secured a fair trial. Second, Judge Hayes would have been accused of discretely searching the record for infractions which might constitute contempt, and any claim that the contempt citations were necessary to maintain an orderly trial would have been weakened. On the other hand, let's assume Judge Hayes at the time he cited Taylor for contempt also imposed sentence. Taylor would have then contended that he was under such a psychological handicap that he could not continue to adequately represent his client, and Judge Hayes would have been accused of making an intemperate judgment because he was still upset about the event which inspired the contempt citation.

What Judge Hayes did was cite for contempt during the trial so that Taylor would know what he had done and possibly be a deterrent for future contempts. After

it was all over and there was time for this, Judge Hayes could then adequately reflect about the amount of sentence that should be imposed.

Petitioner would have another judge pass on these contempts. Pending in this court, Miscellaneous #73-5615, is the case of *Dominick Codispoti and Hurbert Langnes, Petitioners* v. *Commonwealth of Pennsylvania, Respondent.* Codispoti and Langnes were successful in obtaining another judge because they had been so intemperate with the first one that he was adjudged to be incapable of dealing them on a rational basis. An answer to the petition for a writ of certiorari and brief for respondent in opposition was filed by Robert W. Duggan, District Attorney, Allegheny County, Pennsylvania. On page 14 of the respondent's brief above-referred to, Mr. Codispoti rather graphically articulates his feelings about the second judge. Because the language is so obscene, we will not repeat it here. Suffice to say, it makes some of the language used in the play "Hair" sound like the Sermon on the Mount. *Southeastern Promotions Limited* v. *Conrad,* 486 F.2d 894, CA 6, 1973.

Codispoti demonstrates the fallacy that having another judge hear the contempts is an absolute answer. Following Codispoti's course, he can now claim that the second judge was so vilified by him that he should yet have a third one and so on. Suppose instead of a judge, Codispoti had made those remarks to a jury. Would the jury then be deemed disqualified because it had been so vilified? No, such a rule will not work. The only answer is the one that Mr. Justice Jackson gave in the last paragraph of the opinion in *Sacher,* supra, when he was

speaking for the majority of the court. The right of appellate review from a contempt judgment now exists as a matter of right in Kentucky, and this Court has commendably demonstrated a willingness to hear contempt cases particularly when lawyers are involved. Will an appellate court be less biased than a brother trial judge? Of course it will. This is the reason for the rule in *Sacher*, and the reason why petitioner's claim here is factually, legally and philosophically unsound and unworkable.

ARGUMENT

II.

THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE TRIAL JUDGE FOUND HIM GUILTY OF CONTEMPT DURING THE TRIAL, GAVE A REASONABLE OPPORTUNITY FOR ALLOCUTION AND WITHHELD PUNISHMENT UNTIL AFTER THE TRIAL.

The heart of petitioner's claim in his second argument is that summary punishment for contempt in itself is violative of a person's right of due process of law. He first argues that the right of allocution does exist as a matter of right where summary contempt powers are used, and second, he argues that petitioner was not afforded this right.

Petitioner and respondent are in total disagreement about this. We claim the record shows that he was given a reasonable right to speak after he was found to be in contempt. It will be remembered, and we have stated this before, that every time the Trial Court found petitioner to be in contempt he was cited in Chambers

or not before the jury. Petitioner was advised that the punishment would be decided later, and no objection was made by petitioner to this procedure (App. 30).

First, it is our contention that when summary criminal contempt is imposed, the right to be heard does not exist. Summary contempt occurs when the contemnor commits an act which the judge can see or hear. All of the contempts in this case fall within that category. All of the contempts occurred in front of the jury. At no time did the Trial Judge impose contempt for anything Taylor did or said in Chambers or any place else. The Court of Appeals of Kentucky held that there were numerous other incidents where a contempt filing would have been justified. The Court of Appeals also found that a large part of the trial time was consumed as a result of Taylor's speeches. We have not done so, but if all the words spoken in this trial were counted, we think it would be safe to assume that at least one-third of them came from Taylor. No right, no point, no argument, no position was left unstated. A good bit of it apparently was done to impress someone about Taylor's ability o speak and his command of the English language. Some people never tire of hearing their own voice, and this transcript is a classic example of it. In contempt #1, which was rescinded, Taylor responded for eight pages (App. 30-37). Contempt #2 involved a hearing in Chambers which consumed 16 pages (App. 42-54). Contempt #3 involved a proceeding in Chambers which consumed 14 pages (App. 56-69). After the next contempt, the response colloquy took ten pages (App. 69-79). The next one went eight pages (App. 97-105), and it included an off the record discussion (App. 100), to

which no objection was made. At the next one (App. 107) Taylor asked for an exception which was granted, reserved his right to speak for the record which the court granted, and another contempt was imposed in Chambers (App. 108) where Taylor was given the right to speak for the record (App. 109). Taylor objected to the colloquy off the record but offered no bystanders bill. The next contempt involved a deliberate and direct disobedience of a court order (App. 112), and a response to this contempt did occur (App. 115-116). The next one occurred when Taylor continued to ask a question to which an objection had been sustained (App. 119), and he was held in contempt at the bench out of the presence of the jury and no request was made to be heard. In his final argument to the jury, he responded (App. 119). So, petitioner's claim that he was not granted allocution on the right to speak in mitigation or the right to apologize or the right to explain is absolutely defied by this transcript.

As we understand the law of summary criminal contempt, no right to be heard exists. We start with *Ex parte Terry*, 128 U.S. 289, 32 L.Ed. 405. During a hearing before a Supreme Court Justice, a Federal Circuit Judge and a U. S. District Judge, one Sarah Terry became obstreperous. The Marshal was ordered to remove her from the courtroom and when he proceeded to do so, he was attacked by Mrs. Terry's husband, David Terry, who was a lawyer. He was summarily held in contempt and sentenced to six months in jail. A petition for a writ of habeas corpus was filed, and the petition was denied. Terry claimed he was not given the opportunity to be heard, and he had no notice of the

court's intention to hold him in contempt. The Supreme Court in disposing of this contention said:

> Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of comtempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule." 4 Bl. Com. 286. In Bacon's Abridgment, title, *Courts*, E, it is laid down that "Every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and immediately order them into custody." It is utterly impossible, said Abbott, *C. J.*, in *Rex* v. *Davison*, 4 Barn. & Ald. 329, 333, "that the law of the land can be properly administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for

that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

To the same effect are the adjudications by the courts of this country. In *State* v. *Woodfin*, 5 Ired. L. 199, where a person was fined for a contempt committed in the presence of the court, it was said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curia* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial." So in *Whittem* v. *State*, 36 Ind. 196: "When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue and no trial; and the record that shows the punishment will also show the offense, and the fact that the court had found the party guilty of the contempt; on appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court." Again, in *Ex parte Wright*, 65 Ind. 508, the court, after observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers in their presence, said: "For a direct contempt the offender may be punished instantly by

arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing," etc. 4 Steph. Com. Bk. 6, chap. 15; Tidd, Pr. 479-80; *Ex parte Hamilton*, 51 Ala. 68; *People* v. *Turner*, 1 Cal 155.

It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community, What was said in *Ex parte, Kearney*, 20 U. S. 7 Wheat. 39, 45 [5:391, 393], may be here repeated: "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the Legislature, and is not to be devised by courts of justice."

It results from what has been said that it was competent for the circuit court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied—from what occurred under its own eye and within its hearing—that the ends of

justice demanded immediate action, and that no explanation could mitigate his offense or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment. Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority. *Re Chiles*, 89 U.S. 22 Wall. 157, 168 [22:819-823].

In *U. S.* v. *Barnett*, 376 U.S. 681, 12 L.Ed 2d 23, 84 S.Ct. 984, fifty cases are cited in a footnote where this court has supported summary disposition of contempts. In *Bloom* v. *Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522, 88 S.Ct. 1477, the following language from *Cooke* v. *United States*, 267 U.S. 517, 537 and 69 L.Ed. 767, 774 is cited:

> Due process of law, therefore, in the prosecution of contempt, **except of that committed in open court, requires that the accused should be* advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (*Emphasis ours).

We have heretofore cited *Sacher* v. *United States*, 343 U.S. 1, 96 L.Ed. 717, 72 S.Ct. 451, which involved citations for contempt and the punishments for contempts at the end of the trial without allocution. The procedure employed here falls well within *Sacher* and within all of the summary contempt cases cited here. Even though the law does not grant the right to be

heard, in most instances the petitioner was granted the opportunity.

The considerations necessitating summary contempt power are articulated in *Ex parte Terry*, supra, and *Sacher* v. *United States*, supra. The argument advanced by petitioner and amicus does not consider the rights of other people in orderly judicial and trial process. The public funds the judicial system through the payment of taxes. The courts are both a sword and a shield. People secure rights and have rights protected in courts. As a Kentucky judge once put it, "Every defendant is entitled to at least one tolerably, fair trial." The public, the prosecutor, the jurors, the lawyers and the courts are entitled to no less. A license to practice law does not give an attorney the right to say and do as he pleases in a courtroom. If there is no machinery for immediate restraint an amoral lawyer can secure an unjust advantage.

Much of what has been written about contempt power relates to the necessity of maintaining the dignity of the court. This, of course, is a relevant consideration, but the right to a fair and orderly trial is probably the most important. The public spends a small fortune putting the machinery of justice in action, and no one lawyer has a right to subvert this by outrageous conduct and a stark refusal to adhere to the basic standards of trial decorum and good manners. Why should jurors who are summoned from their home or work involuntarily be subjected to this? If the court declares a mistrial because of antics similar to those which have occurred here, the claim of jeopardy immediately arises. If the court is not very careful what it does, the right to counsel

is abrogated. There have been a paucity of cases involving summary contempt. Most judges use it very sparingly and are conscious of the great power they have. In this case, the offense was really two-fold. The contempts intertwined with an absolute disregard for the rights of the client. Antics such as Taylor performed here must have prejudiced his client. At least, the tactics did not help Tinsley. We doubt if Taylor, however, will ever seek reversal of Tinsley's conviction or petition for a writ on the ground that Tinsley was inadequately represented. The trial of a criminal case is one of the most serious responsibilities a lawyer can ever have. To perform the responsibility in the way Taylor performed it here and allow it to go unnoticed would be one of the worst indictments the legal profession has ever had. Rudeness to jurors, rudeness to the court, rudeness to the other lawyers involved in the case combined with the contemptuous acts compel the retention of summary contempt power.

The amicus brief on behalf of the Association of the Bar of the City of New York says, that, "The threat of a later criminal trial, with the possibility of a conviction and severe penalties, is a sufficient deterrent against further disobedience within the court." The transcript of this trial proves beyond cavil that such a threat would have been no deterrent to Taylor because after the first contempt citation, which was rescinded, he escalated his contemptuous activities. The fear of disciplinary ac-

tion by the Bar Association is obviously no deterrent because he has been that route before. *Ky. Bar Association* v. *Taylor*, Ky., 482 S.W.2d 574. You could not gag Taylor or bind him because then his client would have had less of a lawyer than he had. With the exception of a minute number of those licensed to practice law, no deterrent is necessary. All but a very few, we are proud to say, do everything possible to maintain the high standards of the profession. It is not fear of punishment or sanction that prevents the average lawyer from becoming obstreperous and contemptuous but it is an affirmative regard for the rights of others and the high privileges lawyers have. We think the statement that lawyers behave themselves because of fear is one of the most derrogatory things that we have ever seen written about the profession. Anyone who would make such a statement has seriously misjudged the caliber of people who comprise the bar. Judges do not have to summarily punish lawyers other than those of Taylor's ilk. If, on a bad day, he does incorrectly, the appellate courts have been quick to reverse, e.g., *Miller* v. *Stevenson*, Ky., 474 S.W.2d 372 (1971). We note that the amicus curiae brief on behalf of the Association of the Bar of the City of New York is signed by two law teachers. Suppose one day in class a student with complete disregard of the rights other students decided he was going to disrupt the class. Would these two teachers have the student summarily ejected or would they benignly threaten him with later administrative sanctions? Would these two teachers agree that a dissident student should have a right to a trial by jury of other students? We think not, and while this may be an absurd analogy, it is no less absurd than the point claimed.

So, to sum this portion of the argument once again, we say first procedural due process was granted including the right to be heard, and second, the right to be heard was granted even though it was not required. The power of summary contempt must exist because of petitioner and those like him. Petitioner was told of and knew the exact offense he had committed, and this proposition is so clear that this court would not grant certiorari on whether Taylor's actions were contemptuous.*

ARGUMENT

III.

AS PETITIONER'S SENTENCE WAS ACTUALLY SIX MONTHS, HE WAS NEITHER CHARGED WITH NOR CONVICTED OF A SERIOUS OFFENSE WITHIN THE MEANING OF THE SIXTH AMENDMENT'S GUARANTEE OF TRIAL BY JURY.

The Court of Appeals of Kentucky (App. 18-20) has so clearly and succinctly disposed of petitioner's argument relative to his right to a trial by jury that we set it forth in full.

> Taylor next claims that even if the court had the authority to summarily sentence him for contempt, a sentence of three and one-half years without the intervention of a jury violates the 6th and 14 Amendments of the Constitution of the United States. Taylor is rather loose in his designation of the sentence imposed which he has tended all through this appeal to designate as three and one-half years. The truth of the matter is, as shown by the record, that Taylor was sentenced on eight separate charges of contempt, six of said sentences

being for six months, one for ninety days, and other (sic) for sixty days. As we total all of them we, of course, come up with three years and five months. However, as far as this court is concerned we will treat them as separate sentences and not as a totality and shall so discuss them.

The Supreme Court has held upon a number of occasions that criminal contempt occupies the same position as any other criminal offense on the question of whether or not the contemnor is constitutionally entitled to a jury trial. If the offense was "petty," with the sentence being not more than six months, a jury trial was not required while if the offense was "serious," with the sentence being in excess of six months, the contemnor was entitled to a jury trial.

In Bloom v. Illinois, 391 U. S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968), the court held that in contempt proceedings where there was no maximum penalty, as we now have held, the seriousness of the offense for the purpose of determining whether or not a jury trial was constitutionally required is determined by the penalty actually imposed.

In Frank v. United States, 395 U. S. 147, 89 S.Ct. 1503, 23 L.Ed. 2d 162 (1969), the court held that sentences for criminal contempt up to six months may be constitutionally imposed without a jury trial, while in Cheff v. Schnackenberg, 384 U.S 373, 86 S.Ct. 1523, 16 L.Ed. 2d 629 (1966), the court ruled that sentences for criminal contempt exceeding six months may not be imposed by federal courts absent a jury trial or a waiver thereof.

As these rules are based upon the consitutional right of a party to a trial by jury, they would apply equally to proceedings in a state court. It might be well to add at this point that there was not before the court in any of the cases cited the question of

what is termed "aggregate sentences" for the purpose of determining the constitutional right to a trial by jury. No sentence meted out upon the charges against Taylor exceeded six months. Therefore, in the light of the cases above cited, Taylor was not constitutionally entitled to a trial by jury, and the sentences were not violative of any of his constitutional rights.

In United States v. Seale, U.S. Court of Appeals, 7th Circuit, 461 F.2d 345 (1972), the court reaffirmed the rule that the 6th Amendment right to trial by jury applied to serious criminal contempts and that in determining whether or not such contempt was "serious" the courts were required to look at the penalty actually imposed. The court then held that for the purpose of determining whether or not a contemnor was entitled to a trial by jury it would be necessary to look to the aggregate of the sentences and not to the sentences separately. In other words, the rule in Seale is such that we must total the penalty imposed by each sentence for the purpose of determining whether or not a contemnor is constitutionally entitled to a trial by jury.

Taylor claims that the rule in Seale is controlling in determining whether or not his criminal contempt was serious and the sentence thus invalid because he was not granted a jury trial. The trial court on its original charges of criminal contempt ordered that the sentences be served consecutively. This court permitted the trial court to later file a corrected judgment reducing the number of acts of criminal contempt charges and amending the sentences imposed.

The corrected judgment does not direct that the sentences, as amended, be served consecutively; therefore, they must be served concurrently. Thus,

the totality of the sentence actually imposed is a jail sentence of six months.

Seale does not apply here, for no matter how we aggregate the sentences we always come up with a total penalty of six months in jail. In Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed 2d 522 (1968), the guidelines established by the Supreme Court predicate the constitutional right to a jury trial upon a determination of the penalty actually imposed.

The penalty actually imposed on Daniel Taylor is six months in jail. He was not entitled to a jury trial. Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed 2d 162 (1969).

We hold that the sentences imposed on Daniel T. Taylor, III, must be served concurrently; viz.—one six month jail sentence, and except for this holding the judgment of the lower court adjudging him in contempt of court and fixing the penalty for each act of contempt is hereby affirmed.

We are not certain the rule in *Seale* is the best one. See for example: *Commonwealth* v. *Snyder*, Pa., 275 A.2d 312.

Several interesting questions arise from petitioner's and amicus' contentions in this portion of the argument. Although they profess to be speaking for the profession as a whole, and admirably so, it is obvious that they have not considered the ramifications of some of their claims. For example, they claim that at any time a lawyer is sent to jail for criminal contempt the offense should be considered a "serious one" thus entitling a lawyer the right of a trial by jury. *Bloom* v. *Illinois*, supra.

Rule 3.320 of the Court of Appeals of Kentucky provides:

3.320—Procedure Where An Attorney Has Been Convicted of a Misdemeanor or a Felony—When any member of the Association has been convicted of a serious misdemeanor or of a felony a copy of the judgment shall be filed with the Court by the President or Vice-President. If the offense is a felony or if it is a misdemeanor which the Court finds to involve dishonesty or stealing within the concept of **Cotton** v. **Commonwealth, (Ky.)** 454 S.W.2nd 698, the member shall be suspended ipso facto. If no appeal is taken the Court shall enter an order of disbarment. In the event an appeal is taken from such conviction, the final question of discipline shall be deferred until such time as the Court finally determines the matter.

If such appeal results in affirmance of the conviction, then an order of disbarment shall issue forthwith. If the appeal results in reversal, without retrial, then procedures shall be concluded and the suspension shall terminate. If such reversal involves retrial, the suspension shall cease and the matter shall be held in abeyance until such time as the retrial is concluded. If reconvicted, the foregoing procedures shall be as upon the first conviction as hereinabove set out. If not convicted upon such retrial, all proceedings shall cease.

See *Ky. Bar Association* v. *Martin*, Ky., 490 S.W.2d 759. There, Martin, a lawyer, plead guilty to the use of a stolen registration plate of his automobile and an attempt to commit a felony—defrauding of an innkeeper by known inability to pay his bill. Martin received a six-months probated sentence on a plea of guilty after serving 17 days in jail because he was unable to obtain a $1,500 bond as bail.

Martin claimed that he did not know who put the stolen license plate on his car and that he told the innkeeper that the check he gave would not be good until he returned to Louisville. For these offenses, Martin was permanently disbarred.

The first sentence in RCA 3.320 speaks of a serious misdemeanor. Thereafter, the term misdemeanor is qualified by the words involving a dishonest act. In Kentucky, contempts of court are misdemeanors. *Young* v. *Knight*, Ky., 329 S.W.2d 195, 77 A.L.R.2d 994.

The point of all this is that if petitioner's claim succeeds and then a lawyer receives 24 hours in jail for contempt, he may then automatically be subjected to severe disciplinary measures because of the rule as above-stated. Every attorney convicted of a criminal contempt would thereafter be deemed to have been convicted of a serious misdemeanor. Compare *Ky. State Bar Association* v. *McAfee*, Ky., 301 S.W.2d 899, where the Court of Appeals of Kentucky held that the conviction of a lawyer in Federal Court of wilfully and knowingly failing to make income tax returns and who was sentenced to nine months in prison and fined, did not involve such moral turpitude as to be grounds for disbarment. Compare *Ky. State Bar Association* v. *Brown*, Ky., 302 S.W.2d 834, Income Tax Evasions, and *Underwood* v. *Commonwealth*, 38 K.L.R. 32, 105 S.W. 151. In the Underwood case, the county attorney had been convicted three times for bootlegging and the court felt this justified disbarment.

There may be occasions where repeated convictions for contempt may well warrant disciplinary action by an attorney's licensing authority. *Ky. Bar Association* v.

Taylor, Ky., 482 S.W.2d 574. The distinction between proceedings for contempt and those for disbarment is well stated in *Legal Ethics*, Henry S. Drinker, 1953 Columbia University Press, New York, p. 39, where an excerpt from *People ex rel.* v. *Green*, 7 Colo. 237 (1884) is cited.

> The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power, for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the later is intended to protect, generally, the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interest of litigants against injury from those intrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely ex parte; the sole penalty in connection with the latter is a prohibition from practicing in courts of record, and this judgment can only be entered upon notice of the charge preferred and a full hearing in defense; ample time for preparation being given and all legitimate testimony being allowed and considered. A contempt may consitute ground for disbarment, but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt.

Hopefully, we will never be held in contempt by any court. We hope the same for all our brothers. If we are, however, we want to have the right to exercise a judgment as to whether we want to do our 30 hours in jail without being confronted with the necessity of taking an appeal or litigating with our licensing authority as to whether or not we can keep our license.

A reasonable delineation has been made by this Court as to what constitutes really a serious offense. If the penalty does not exceed six months, then it is not an offense which requires a jury and is not serious. What is serious and not serious must be determined by this Court and not by anyone else. What may be serious to X might not be to Y and the converse might be true. Conviction of public drunkeness might be considered serious by a preacher but not by the president of a distillery. One standard of seriousness must exist and it must be set by this Court, and this Court has done as stated.

The second interesting question which arises from all of this is the right of a court to modify its judgment. The right of an appellate court to modify a judgment is also involved. What should be an appellate court's right to deal with contempt judgments?

As we argue that if the summary contempt power is abused protection is afforded by the right of appeal and review by appellate courts, then we must accordingly argue that the appellate courts must have the power to modify such sentences. We are aware of the raging controversy surrounding appellate courts' rights to modify, or perhaps to correct would be a better term, sentences imposed by the trial court. Appellate courts in Kentucky have freely availed themselves of this prerogative

in disciplinary procedures when reviewing recommendations from the Bar Association authorities. Compare *Ky. Bar Association* v. *Taylor*, supra, and *In re Viniard*, Ky., 406 S.W.2d 736.

That an appellate court can reduce a sentence which appears unduly harsh in our opinion is no longer open to argument. See *U. S.* v. *McKinney*, 466 F.2d 1403, CA 6, 1972. There the Court of Appeals reduced a draft dodger's sentence from five to one year. This Court did it in *Bartone* v. *United States*, 375 U.S. 52, 11 L.Ed. 2d 11, 84 S.Ct. 21, when it reversed the 5th Circuit judgment denying correction of an enlarged sentence. See also *Bozza* v. *United States*, 330 U.S. 160, 91 L.Ed. 818. In affirming the district judge's correction of a sentence, the court said, "The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense." Since this Court's judgment in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, abolishing the death penalty, state appellate courts all over the country have modified and corrected judgments calling for the death penalty without the necessity of resentencing. See *Caine* v. *Commonwealth*, Ky., 491 S.W.2d 824.

Suppose a police judge is hearing a misdemeanor case. The judge is under the impression that he can impose a 30-day jail sentence when in fact he can only by law impose a 10-day jail sentence. Should he not have the power to correct and modify the erroneous sentence? Suppose the maximum was five months, but the police judge thought it was seven months and imposed seven months. After being made aware of his mistake, he reduced it to five months. Would the defendant

automatically be entitled to a trial by jury because the police judge had originally sentenced him to seven months instead of five months? The answer is obviously no, and at any rate, we believe that the judgment of the Court of Appeals of Kentucky in this respect is the law of the case. (App. 20). See also *In re Channels*, 131 Ky. 737, 100 S.W. 214. Compare *Jackson* v. *Commonwealth*, 187 Ky. 760, 220 S.W. 1045, 9 A.L.R. 955, and *Edge* v. *Commonwealth*, 139 Ky. 252, 129 S.W. 591. An excessive sentence is void only as to the excess. *Dimenza* v. *Johnson*, 131 F.2d 47, CA 9, 1942.

RCr 10.10, which is Kentucky's Rules of Criminal Procedure, provides, "Clerical mistakes in judgments, orders or other parts of the record and errors arising therein, arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." It is obvious that both the respondent and the Court of Appeals of Kentucky complied with this rule in correcting the judgment.

The corrected and modified judgment eliminated the requirement that the sentences be served consecutively. The Court of Appeals of Kentucky construed this to mean that they would be served concurrently and, therefore, came to the conclusion that six months was all that Taylor would be required to serve. It seems to us that if the judgment is silent on the matter and there is no rule requiring the contrary and absent the original statement that they were to be served consecutively, the

only logical conclusion the court could reach was that they are to be served concurrently. RCr 11.04 requires the judgment to state whether the sentences are to be served consecutively or concurrently. Absent the word consecutively and absent the word concurrently, the presumption would seem to be that the sentences are to be served concurrently. This is what the Kentucky court held, and we contend this is now the law of the case and no claim has been made in this court that the judgment is void because of the omission.

CONCLUSION

We think the most critical question in this case relates to the remarks Judge Hayes made at the time he imposed the sentences on Taylor. We have discussed this in some detail in Argument I. The claim raises the question of whether or not the statements made conclusively show a predisposition of hostility by respondent toward the petitioner. If we are correct, as we believe we are, in our premise that Taylor was indeed given the right to be heard and was heard on the contempts, then no further hearing was required before sentence was imposed. The explanation and responses given by Taylor were such as to include all facts argued by amicus which would be advanced in defense or mitigation. The castigation of Taylor by Judge Hayes has no relevance in our opinion to whether or not the offenses were serious ones because that determination must ultimately be made by the guidelines established by this court. The standard is, of course, "the sentence actually to be served." The sentence here ultimately to be served is six months. Therefore, irrespective of how

petitioner or respondent viewed the seriousness of the offenses, this court has already determined that it is not a serious crime. *Bloom* v. *Illinois*, supra.

We compare the remarks of Judge Hayes and those made by District Judge Irving Kaufman at the time he sentenced Julius and Ethel Rosenberg to death. (*The Implosion Conspiracy*, Louis Nizer, Doubleday & Company, Inc., Garden City, New York 1973, pp. 356-357).

> I consider your crime worse than murder. Plain deliberate contemplated murder is dwarfed in magnitude by comparison with the crime you have committed. In committing the act of murder, the criminal kills only his victim. The immediate family is brought to grief and when justice is meted out the chapter is closed. But in your case, I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country.
>
> The evidence indicated quite clearly that Julius Rosenberg was the prime mover in this conspiracy. However, let no mistake be made about the role which his wife, Ethel Rosenberg, played in this conspiracy. Instead of deterring him from pursuing his ignoble cause, she encouraged and assisted the cause. She was a mature woman—almost three years older than her husband and almost seven years older than her younger brother. She was a full-fledged partner in this crime.

Love for their cause dominated their lives—it was even greater than their love for their children.

What I am about to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fiber of my body has been taxed. I am convinced beyond any doubt of your guilt. I have searched the records—I have searched my conscience—to find some reason for mercy—for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendants Rosenberg.

The sentence of the Court upon Julius and Ethel Rosenberg is, for the crime for which you have been convicted you are hereby sentenced to the punishment of death, and it is ordered upon some day within the week beginning with Monday, May 21st, you shall be executed according to law.

Judge Kaufman's feeling obviously came from what he heard and saw during the trial. He speculated, however, when he said, "Who knows but that millions more of innocent people may pay the price of your treason."

Mr. Nizer further very appropriately observed on page 464:

In the past, doughty lawyers, fighting great causes, have used "open warfare" against the system. Some have denounced the prejudice of the presiding judge or the southern jury sitting in the case. At times these orations stirred the blood with their eloquence and sincerity. But what happened to the client on whose behalf they were made? What

> good did it do him that the lawyer's speech was deemed grandiloquent enough to be included in anthologies, if he hanged or rotted in jail?
>
> In the interest of his client, a lawyer must curb his sense of outrage, swallow his pride if he is humiliated or rebuked by the judge, and even bow to rudeness from his adversary. The only consideration if he strikes back is whether it will advantage his client. Playing to the gallery or to public opinion, which in this case was international, could possible be justified if it was the best way to win. This was not the case. Finerty's bitter comments published in the American and foreign press might gratify the deep feelings of many readers, but it was not in their power to sustain Judge Douglas' stay. He had infuriated the judges before him and given an extra dimension to the unsavory position of the Rosenbergs.

These last quoted two paragraphs sum our feeling about this case more than anything else we have been able to write or argue.

Thus, it is our contention that Judge Hayes could and did impartially pass judgment on Taylor, that Taylor was given a reasonable opportunity for allocution and as the actual sentence to be served is actually six months, Taylor was neither charged nor convicted of a serious offense within the meaning of the Sixth Amendment to the Constitution of the United States. If there was ever any doubt about the necessity of a trial judge retaining the power of summary contempt, the record in this case demonstrates the compelling necessity for this power to be retained.

We disagree that this is a case of great constitutional dimension and import as petitioner and amicus argue. We disagree that any holding made by this court will ever be of much benefit to bench or bar because of the outrageous facts that are present here. Taylor does not come into this case with clean hands. He stands convicted of eight contempts and this court refused to hear Taylor's petition on whether or not his actions were contemptuous. We do not believe any two contempt cases can ever be alike. We can envision cases where the confrontation is totally the lawyer's fault or totally the court's fault or both. Every contempt case must be considered on its particular facts. There can be no general rule in a contempt case. The trial judge must be presumed to be in the best position to deal with contempt both from the point of view of retaining order and providing a deterrent. If he is wrong, he can be reviewed. If the present rules of summary contempt are destroyed, it will subject a trial judge to "open season" by those who claim they have regard for the rights of others but in truth have no feeling for anyone's rights except their own.

Petitioner argues that judges should be made of strong and stern stuff and not be overprotective of their sensitivities. Firm, fair and evenhanded justice, petitioner argues, is all that is necessary to maintain order in a trial. Ordinarily, this is true, but this is not an ordinary case. Eliminating all the impassioned argument, the breast beating, the cries of unfair treatment and hostility, the facts here involve a lawyer who was deliberately contemptuous, whose actions were calculated to disrupt and destroy and to prevent a fair

and orderly trial. Unfortunately for petitioner, he was confronted with a trial judge who was equally determined that this should not happen.

Unfortunately for Taylor, when he commenced his collision course aboard the vessel Disruption, he failed to observe Judge Hayes at the helm of the Leviathan. Taylor is the deliberate begetter of his own predicament.

Taylor has been dealt with fairly and firmly by the courts below. If this court does any damage to the holding below, it will be an invitation for a certain few to escalate their chaos-causing conduct to the extreme detriment and harm of those whom they claim they are trying to serve. Our courts in modern times have been zealous in their efforts to protect the poor, the unpopular, the downtrodden, those who speak for a minority few, those who are oppressed, and those who have been unfairly treated. None of this, however, has any relevance to a lawyer who engages in unconscionable conduct. The point of all this is that lawyers can be zealous and vigorously protect the rights of their clients without being contemptuous and without disrupting the proceedings. The annals of history are replete with instances where lawyers have defended unpopular cases and espoused unpopular causes with dignity and most important, effectively. The famous Henry Clay, a slave owner, once successfully defended his firey cousin, Cassius Clay, one of the nation's leading abolitionists at the time, in front of a proslavery jury and in a proslavery part of Kentucky. So, the argument that conduct like Taylor's is necessary and the elimination of summary contempt power is vital to perpetuate it has no foundation in fact or fiction. It has been our observation that

lawyers who engage in tactics such as Taylor performed here usually secure the maximum punishment from juries for their clients.

The jury system for determining the truth of a controverted fact may not be perfect, but with all the procedural safeguards relative to evidence and trial practice, it has proved to be the most workable and enduring under our system of Anglo-American jurisprudence. There are those who would destroy it, but oddly enough, they have failed to advance a better system.

In every contest there must be some final arbiter or umpire. This is as true in the game of life as in the game of law. This is what happened here.

WHEREFORE, the respondent respectfully demands:

(1) That the judgment of the Court of Appeals of Kentucky be affirmed.

(2) That this court grant all other and proper relief in the premises both legal and equitable as the circumstances warrant.

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